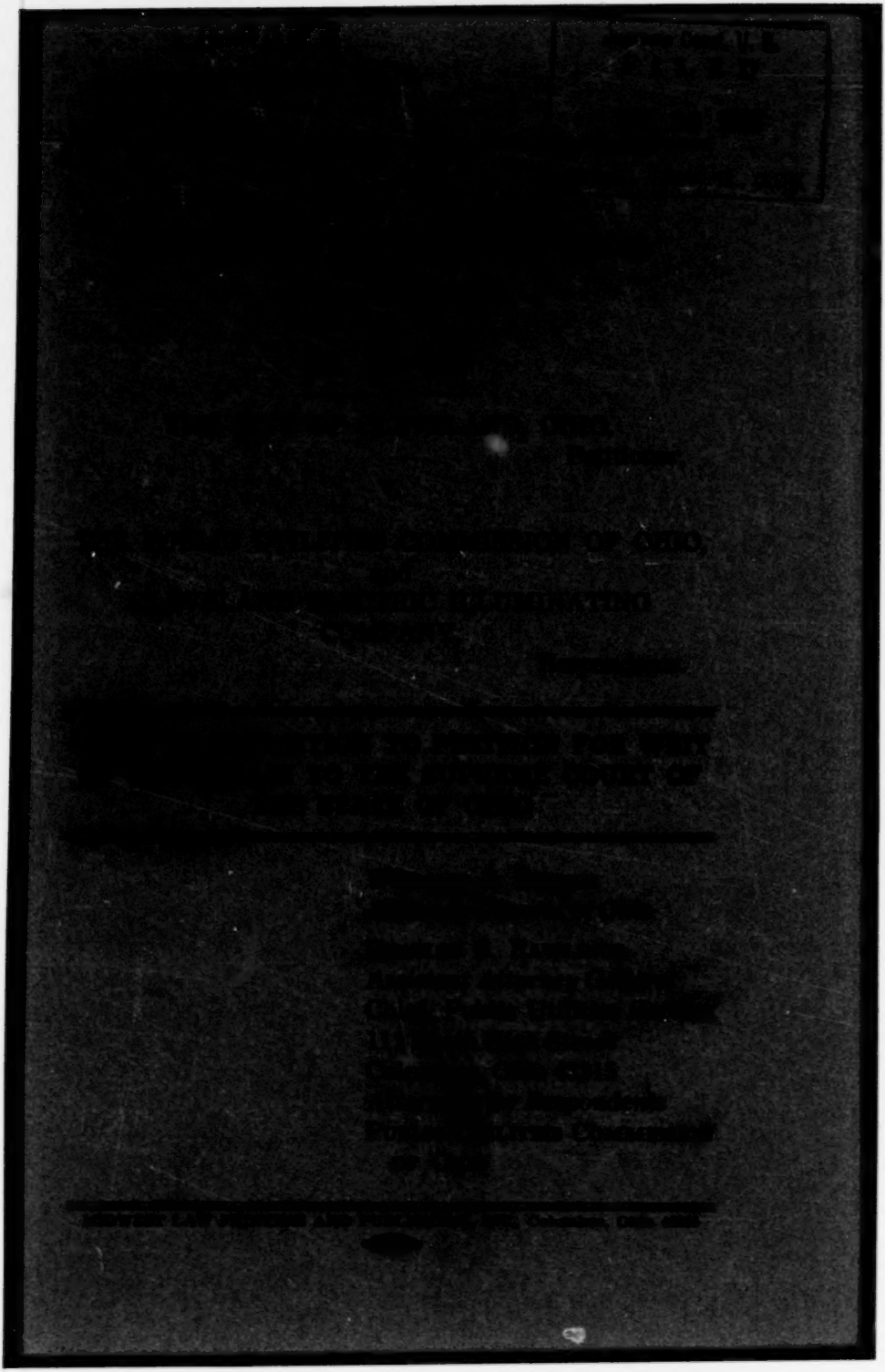


IN THE

Supreme Court of the United States

October Term, 1975

No. 75-447

THE CITY OF CLEVELAND, OHIO,
Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
and
CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Respondent, Public Utilities Commission of Ohio, by its Counsel William J. Brown, Attorney General of Ohio, opposes the issuance of a Writ of Certiorari to review the judgment of the Supreme Court of Ohio in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 403, 330 N.E. 2d 1 (1975), affirming, in part, an Order of the Public Utilities Commission of Ohio.

STATEMENT OF THE CASE

On October 7, 1971, the Cleveland Electric Illuminating Company (hereinafter referred to as "CEI"), a company engaged in the generation and sale of electricity to consumers in nine counties of the State of Ohio, filed an application with the Public Utilities Commission of

Ohio (hereinafter referred to as "Commission") for an increase in rates. CEI sought an increase in all of its rates except those involved in contracts for the sale of electricity to governmental agencies for street lighting and to other utilities.

In reviewing CEI's application, the staff of the Commission made no allocation for plant devoted to the production and distribution of electricity for sale to other utilities or to municipalities for street lighting because the allocation would have produced no measurable affects upon the overall rate of return (Petition pp. 22-23).

On November 28, 1973, the Commission issued its Opinion and Order on the application of CEI. The Commission made no allocation for plant devoted to the production and distribution of electricity for sale to other utilities or municipalities, relying upon the investigation of its staff, and made no adjustments for the interchange of power, relying upon testimony presented by CEI (Petition pp. 22-23).

This matter was appealed to the Supreme Court of Ohio which affirmed the Commission's Order with respect to the issues raised by Petitioner. The Supreme Court of Ohio held, with respect to these issues, that the Order of the Commission was not manifestly against the weight of the evidence (Petition pp. 89-92).

REASONS FOR DENYING THE WRIT

I.

Petitioner is asking this Court to review an evidentiary matter which does not involve any substantial Federal question.

Assuming that decisions of this Court require interstate and intrastate property to be allocated when fixing intrastate rates, the evidence in this case indicates that an allocation would have "no measurable effect upon the rate of return" (Petition p. 23).

In determining the value of CEI's rate base, the Commission made no reduction for any property used to produce and distribute electricity for sale to other utilities or municipalities. The Commission relied upon a study conducted by its staff:

> ". . . the staff found that a sample allocation indicated no measurable effect upon the rate of return and therefore an extended allocation was not justified . . . While Cleveland disputed this judgment, it presented no evidence . . ." (Petition p. 23).

In reviewing the Commission's Order, the Supreme Court of Ohio quoted extensively from the record and then held that the Commission's decision was not manifestly against the weight of the evidence (Petition pp. 90 and 92).

Respondent Commission respectfully suggests that there are no important or special reasons which warrant review of this evidentiary question.

II.

The decision of the Supreme Court of Ohio is in accord with the applicable decisions of this Court.

Petitioner argues that the decision of the Supreme Court of Ohio conflicts with this Court's holdings in *The Minnesota Rate Cases*, 230 U.S. 352, 33 S. Ct. 729, 57 L. Ed. 1511 (1912) and *Smith v. Illinois Bell Telephone Company*, 282 U.S. 133, 51 S. Ct. 65, 75 L. Ed. 255 (1930).

Two separate and distinct issues were discussed by this Court in *The Minnesota Rate Cases*. The first was whether the intrastate rates established by Minnesota imposed a direct or substantial burden upon interstate commerce or conflcited with any federal law regulating interstate commerce. The second was whether the intrastate rates established by Minnesota were so unreasonably low that the railroads were deprived of their property without due process of law and denied equal protection of the laws.

It is unclear which of these issues is being raised by the Petitioner, since it relies upon the Commerce Clause but quotes a portion of *The Minnesota Rate Cases* which is concerned with the confiscatory nature of the rates. For this reason, each issue will be addressed by this brief.

First, the decision of the Supreme Court of Ohio does not impose any direct or substantial burden upon interstate commerce nor is it in conflict with any federal law regulating interstate commerce. Neither the Commission nor the Supreme Court of Ohio attempted to fix rates for the *interstate* sale of electricity; therefore, Petitioner's reliance upon *Pub. Util. Comm'n of Rhode Island v. Attleboro Steam and Elec. Co.*, 273 U.S. 83, 47 S. Ct. 294, 71 L. Ed. 549 (1927) is misplaced since this Court specifically held that a state may not fix rates for the *interstate* sale of electricity. Petitioner implies, without ever specifically mentioning the federal statute upon which it is relying, that the decision of the Supreme

Court of Ohio conflicts, in some way, with the regulatory jurisdiction of the Federal Power Commission over interstate commerce. Respondent Commission respectfully submits that this is a fallacious argument. Neither the Commission nor the Supreme Court of Ohio attempted to fix rates for the interstate sale of electricity nor did they adjust intrastate rates to take into account an unreasonably low or high rate fixed by the Federal Power Commission for the interestate sale of electricity.

Secondly, the Petitioner quotes extensively from a portion of *The Minnesota Rate Cases* which discussed the test to be applied when determining whether rates are confiscatory, even though Petitioner does not allege that the rates fixed for CEI are confiscatory. The Court held that the "fair value" of the railroad's property must be calculated, after separating the intrastate property from interstate property, because the state could not justify unreasonably high or low intrastate rates based upon the level of interstate rates. Assuming that the test is still applied by this Court, the decision of the Supreme Court of Ohio and of the Commission is in accord with the test insofar as it applies to the allocation of interstate and intrastate property. Both the Supreme Court of Ohio and the Commission recognize the importance of separating such property when fixing rates. However, in this case both the Supreme Court of Ohio and the Commission found that such a separation was not needed since it would have no measurable affect upon the rate of return.

Even if the Supreme Court of Ohio and the Commission have not complied with the holdings of this Court in *The Minnesota Rate Cases*, this Court should not review this case because *The Minnesota Rate Cases* are no longer applicable. Late in the 19th Century, this Court

began reviewing railroad rates fixed by various states. *The Minnesota Rate Cases* were early progenitors of the most recent cases which are concerned with the contitutionality of public utility rates. This Court at different times has ennunciated different tests to be applied when judging the constitutionality of public utility rates. The more recent decisions of this Court indicate that this Court will review only the "total effect" of a rate order and not the method employed to reach the end result. In *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S. Ct. 251, 88 L. Ed. 333 (1944) this Court stated that:

> "It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the [Natural Gas] act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." *Id.* at 320 U.S. 602.

Respondent Commission respectfully suggests that the decision of the Supreme Court of Ohio is in accord with the applicable decisions of this Court.

CONCLUSION

Respondent Commission opposes the issuance of a Writ of Certiorari to review the judgment of the Supreme Court of Ohio in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 403, 330 N.E. 2d (1975) and respectfully urges this Court to deny the Petition.

Respectfully submitted,

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